UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| CARLOS A. PIMENTEL,<br><br>Plaintiff,<br><br>v.<br><br>JO ANNE B. BERNHART, Commissioner Social Security Administration,<br><br>Defendant. | ) | CIVIL ACTION NO. 01-10651-PBS |

**MEMORANDUM AND ORDER**

May 9, 2002

**Saris, U.S.D.J.**

## I. INTRODUCTION

Pursuant to 42 U.S.C. § 405(g), plaintiff Carlos A. Pimentel moves to remand his Supplemental Security Income ("SSI") disability claim to the Social Security Administration ("SSA") for a new administrative determination, based on evidence not before the Commissioner. The government opposes the motion on the ground that the evidence was not submitted to the Appeals Council in a timely manner. Both sides have also filed cross-motions for judgment. For the reasons set forth below, the Court **ALLOWS** plaintiff's motion to remand.

## II. FACTUAL BACKGROUND

The administrative record contains the following facts.

Plaintiff Pimentel is a 41-year-old individual with a 5th grade education from his native Azores. (Tr. 12). He speaks little English, cannot write English, and has work experience as a carpenter and a siding installer. (Tr. 12). At the time of the administrative hearing, plaintiff was married and was living at home with his wife and four daughters. (Tr. 28).

**A. Medical History at Time of Hearing**

Records documenting plaintiff's medical history begin in March 1996, when plaintiff went to see Dr. James Worthington for pain and swelling in his right ankle. (Tr. 244). Plaintiff was working as a carpenter and painter at that time. (Tr. 244). On October 28, 1996, Dr. Worthington recommended surgery to remove the loose calcium deposits in plaintiff's ankle joint, but determined that no other treatment was necessary. (Tr. 245). Plaintiff returned to Dr. Worthington on January 24, 1997, for the recommended right ankle arthroscopy and partial removal of membranes in the joint.[1] (Tr. 246). After plaintiff's surgery, Dr. Worthington found in April 1997 that plaintiff had an excellent range of motion and full strength in the ankle. (Tr. 247). Plaintiff continued to work as a painter.

On August 19, 1997, plaintiff began to complain of pain in the back of his right knee. (Tr. 249). In response, Dr.

[1] An arthroscopy is an examination of the interior of a joint by means of an endoscope or arthroscope.

Worthington ordered an MRI that revealed a small joint effusion and a tear involving the medial meniscus.[2] (Id.). Dr. Worthington recommended conservative treatment for these injuries, and found that plaintiff responded well to this treatment. (Id.).

In September 1998, plaintiff returned to Dr. Worthington complaining of pain in his right ankle. (Tr. 251). Because neither the objective exam nor the x-rays showed any major arthritic condition of the ankle, Dr. Worthington did not recommend further surgery. He did however suggest an elastic ankle brace and oral anti-inflammatory drugs. (Tr. 252). In his records of this consultation, Dr. Worthington stated that it was "hard to account for the subjective symptoms that [plaintiff] reports on an objective basis." (Id.).

Four months later, plaintiff reported to the emergency room of Charlton Memorial Hospital complaining of chest pains. (Tr. 13). Soon after his arrival at the hospital on January 12, 1999, plaintiff began to experience leg weakness and became unable to stand. (Id.). Examination revealed transverse myelitis, an inflammation of the spinal cord at the T4 level of the lower back region, a small disc herniation at the T7-8 level (mid-to-lower

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[2] A joint effusion is the escape of fluid from a tissue into a body cavity. The medial meniscus is a crescent-shaped piece of fibrocartilage attached to the inner margin of the top of the shin bone.

back region), a left disc herniation or spurring present at C5-6 in the upper chest region that might affect the existing nerve root, and a broad diffuse disc bulge at C6-7.[3] (Tr. 231-235). Plaintiff did not resume work after his release from Charlton Memorial Hospital. (Tr. 42). On January 19, 1999, plaintiff checked into St. Elizabeth's Medical Center for nerve response testing. (Tr. 238). This testing yielded normal results. (Id.).

Plaintiff returned to Dr. Worthington on February 8, 1999 for a follow-up appointment regarding his ankle. (Tr. 253). Plaintiff reported that the treatment was helping him considerably, and that he was presently seeking a more sedentary type of work. (Tr. 253). On June 30, 1999, plaintiff went back to Dr. Worthington with a new problem: pain in the left knee. (Id.). Dr. Worthington ordered an MRI and x-rays to find the cause of plaintiff's pain, but found nothing. (Tr. 254). This was plaintiff's last consultation with Dr. Worthington.

After plaintiff's release from St. Elizabeth's Medical Center in February 1999, he began seeing Dr. James Lisak for

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[3] Transverse myelitis is the inflammation of the spinal chord involving all its components at a particular level. Here, the inflammation was found at the T4 level. A disc herniation is an abnormal protrusion of any anatomical structure, through a weak spot or forced opening in part of the surrounding wall or partition. The herniation was found at the T7-8 level, which is located in the thoracic (mid-to-lower back) region. The C5-6 and C6 levels are located in the brachial plexus, which is in the upper part of the chest.

treatment of Brown-Sequard's syndrome (muscle weakness) in the setting of T6 transverse myelitis.[4] (Tr. 240). In July 1999, Dr. Lisak opined that plaintiff's transverse myelitis was improving, but that he exhibited some residual deficits that occurred with prolonged walking and other repetitive activities. (Tr. 243). Dr. Lisak also noted that plaintiff suffered from obesity with postural abnormalities that may contribute to back, knee and hip pain. (Id.). He indicated that plaintiff needed to lose weight, and advised plaintiff not to perform any sustained labor. (Id.).

According to Dr. Lisak's report, plaintiff returned on November 15, 1999, stating: "I can't work, I'm disabled." (Tr. 286). Dr. Lisak again diagnosed plaintiff with resolving thoracic myelitis and posture abnormality resulting from obesity, and recommended a work-hardening program. (Id.). Dr. Lisak also took x-rays of plaintiff's left foot and found that they did not reveal any osteoarthritic complications. (Tr. 283). When Dr. Lisak saw plaintiff next, on February 7, 2000, he recommended decreased activities because plaintiff was "a moderately severely overweight gentleman with a severe lumbar lordosis."[5] (Tr. 287).

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[4] Brown-Sequard's syndrome is a condition resulting from injury to the spinal chord whereby the patient experiences paralysis or weakness of the muscles on the same side of the body as the injury.

[5] Lumbar lordosis is an abnormal bending or curving of the spine in which the convexity is forward.

Dr. Lisak noted that although plaintiff reported a worsening in his symptoms, his examination did not reveal any objective evidence of a worsening neurologic condition. (Tr. 287). Dr. Lisak also ordered x-rays of plaintiff's left hip on February 9, 2000; these x-rays did not reveal any significant abnormalities. (Tr. 288).

Plaintiff had also been seeing Dr. Manuela Mendes, his treating primary care physician, since February 18, 1999. (Tr. 268). In his initial examination, Dr. Mendes noted crepitus in both knees.[6] (Tr. 271). Dr. Mendes took x-rays of plaintiff's left knee on March 24, 1999, but found nothing. (Tr. 272). On April 22, 1999, an MRI failed to show any definite evidence of meniscal tear, but did show minimal fraying of the apex of the lateral meniscus.[7] (Tr. 271). On April 29, 1999, Dr. Mendes reported that this MRI revealed some early degenerative changes. (Tr. 274). Dr. Mendes' June 10, 1999 letter to plaintiff's attorney stated that plaintiff was "permanently and completely disabled due to a T-4 Transverse Myelitis." (Tr. 273).

On June 16, 2000 (which was the same day the Administrative Law Judge issued his opinion), Dr. Mendes ordered an MRI of plaintiff's back. The MRI revealed a left postero-lateral disc

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[6] Articular crepitus is the grating of a joint.

[7] The apex of the lateral meniscus is the tip of the cartilage of the knee joint.

protrusion at the L4-5 level effacing the left L5 nerve root, asymmetric posterior disc bulge at the L3-4 abutting the left L4 nerve root, and degenerative changes involving the L3-L4, L4-L5 and L5-S1 intervertebral discs.[8]

**B. Plaintiff's Disability Hearing**

On March 26, 1999, plaintiff applied for Supplemental Security Income payments based on disability. (Tr. 11). Plaintiff alleged that he had been unable to work since January 12, 1999, due to a lack of feeling from the chest down, a burning sensation in the left leg, and transverse myelitis. (Tr. 11). The claim was denied both initially and on reconsideration. (Tr. 11). Plaintiff then filed a request for hearing.

A hearing was held before the ALJ on May 15, 2000. (Tr. 25). The plaintiff testified at the hearing with the assistance of counsel and an interpreter. (Tr. 25). Plaintiff testified that he had not worked since January of that year, and that he had not sought new work since then. (Tr. 29-30). He explained that he could not work because his right leg lacked strength when he walked, because he felt pain in his left leg from his chest down, because he had needle pricks and pain in his knee when he moved, and because he had pain in his right foot. (Tr. 31-32). Plaintiff told the ALJ that during the time he spent at home, his

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[8] These injuries involve the intervertebral discs and nerves in the lumbar plexus (lower back) and sacral plexus (upper leg and hip) regions.

activities were limited to watching television for up to half an hour at a time, taking ten-minute walks, and making coffee. (Tr. 33-34).

Vocational Expert Kenneth Smith then testified that plaintiff's work skills were not transferrable to sedentary work. (Tr. 44). While questioning Mr. Smith, the ALJ described a hypothetical claimant of the same age, education and work experience as the plaintiff, who had a residual function capacity for sedentary work, and who had the opportunity to sit or stand at will. (Tr. 45). The ALJ then asked Mr. Smith whether such a hypothetical claimant could perform a sedentary type of work. (Id.). Mr. Smith explained that while none of the claimant's acquired skills could be transferred, there were other jobs in the regional and national economy that could be performed by the ALJ's hypothetical claimant; Mr. Smith identified assembler, inspector, and hand packager as such jobs. (Tr. 46).

In his opinion dated June 16, 2000, the ALJ found that plaintiff was unable to stand for more than 10 minutes at a time, and that he suffered a mild to moderate reduction in his ability to maintain attention/concentration. (Tr. 17). The ALJ concluded that plaintiff could work at the sedentary exertional level limited by a need to sit or stand at the plaintiff's option. (Tr. 17). The ALJ explained that because plaintiff's past work involved lifting in excess of ten pounds, plaintiff

could not return to any of the jobs he held in the past. (Tr. 18). After considering plaintiff's age, educational background, work experience, and residual functional capacity, the ALJ found, however, that plaintiff was capable of making a successful adjustment to work existing in significant numbers in the national and regional economy. (Tr. 18-19). Accordingly, the ALJ concluded that plaintiff was not under a disability as defined in the Social Security Act. (Tr. 19). Plaintiff appealed on July 18, 2000. The Appeals Court rendered its decision on February 14, 2001. This action was filed on April 19, 2001.

**C. Medical History Subsequent to Hearing**

The plaintiff submitted additional medical records to the Office of the United States Attorney on November 8, 2001. On August 10, 2000, plaintiff was evaluated by Dr. Leslie Stern, a neurosurgeon, for the first time. He explained to the doctor that he had suffered transverse myelitis eighteen months prior, and that he was presently experiencing weakness in his legs and discomfort in his lower back. Dr. Stern felt it "highly probable" that plaintiff had L5 nerve root involvement <u>on the left</u> related to his degenerative change at L4-5, and suggested L5 nerve root decompression.[9] Plaintiff elected to undergo nerve

[9] Nerve decompression is the relief by surgical means of pressure caused (in this case) by bone.

root decompression surgery on August 29, 2000. Dr. Stern noted that “postoperatively, the patient continued to complain of similar pain in the leg as preoperatively.”

When Dr. Stern saw plaintiff again on January 25, 2001, he continued to complain of the same pain; the doctor described this pain as radiating from the postero-lateral aspect of the left leg to the lower leg level, varying in intensity, and mixed with the burning pain he had prior to his surgery. A postoperative MRI scan revealed persistent degenerative disc disease at L4-5 biased to the left with compromise of the neuroforamen. In reviewing these medical materials, Dr. Stern concluded on February 10, 2001, that she “would consider this patient disabled from performing any gainful employment, because of his persistent back and left leg pain.”

On November 13, 2001, plaintiff met with Dr. Mark Weiner for evaluation of his persisting symptoms. Upon examination, Dr. Weiner found that plaintiff never fully recovered from transverse myelitis, and noted the following residual problems: severe burning sensation throughout the left side of the body especially into the leg, fatigue that severely limits ambulation, and ongoing Brown-Sequard's syndrome. Dr. Weiner’s medical report stated that plaintiff suffered from very severe dysestheia and

discomfort,[10] as well as motor fatigue, which made it very difficult for plaintiff to sit, stand, or stay in one place for any prolonged period of time. Based on his examination, Dr. Weiner found that plaintiff was "totally" disabled: "As a result of his clinical symptoms and physical disabilities, he is incapable of performing heavy labor work, light duty work or sedentary work."

## IV. DISCUSSION

Plaintiff argues that this Court should consider as new evidence: (1) Dr. Leslie Stern's report dated February 10, 2001 (discussing the St. Anne's examination of June 16, 2000, and the Charlton Memorial examinations of August 10 and 29, 2000, and January 31, 2001); and (2) Dr. Mark Weiner's report concerning the examination of November 13, 2001. The government contends that these reports do not justify remand for two reasons. First, it argues that Dr. Stern's report could have been submitted to the Appeals Council before the Council rendered its decision on February 14, 2001. Second, it argues that Plaintiff did not have good cause for failing to obtain and submit these records earlier.

### A. The Legal Standard

Pursuant to 42 U.S.C. § 405(g), this Court "may at any time

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[10] Dysesthesia is the impairment of one of the senses, in this case the sense of touch.

order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence that is material, and that there is good cause for the plaintiff's failure to incorporate such evidence into the record in a prior proceeding." A remand to the Commissioner is appropriate when "the court determines that further evidence is necessary to develop the facts of the case fully, that such evidence is not cumulative, and that consideration of it is essential to a fair hearing." Heggarty v. Sullivan, 947 F.2d 990, 997 (1st Cir. 1991) (holding that report of doctor was not cumulative because it filled a gap in the record concerning the severity of the skin disease) (citing Evangelista v. Sec'y of Health & Hum. Servs., 826 F.2d 136, 139 (1st Cir. 1987)). An unsuccessful applicant may not obtain remand for consideration of new evidence under § 405(g) "merely by retaining an expert to reappraise the evidence and come up with a conclusion different from that reached by the hearing officer." Evangelista, 826 F.2d at 140.

An applicant has an obligation to submit all evidence to the ALJ and the Appeals Council; failure to do so must be justified by a showing of good cause. See id. at 141. Good cause is shown "if the evidence proffered by [the claimant] was unavailable at the time of the Secretary's administrative proceedings." Pilet v. Apfel, 20 F. Supp. 2d 240, 247 (D. Mass. 1998)(quoting

Bilodeau v. Shalala, 856 F. Supp. 18, 20 (D. Mass. 1994)).

By regulation, an applicant may provide new material evidence to the Appeals Council and the Council "shall" consider any such evidence relevant to the appropriate time period. See 20 C.F.R. § 416.1470(b), which provides:

> In reviewing decisions based on an application for benefits, if new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision. In reviewing decisions other than those based on an application for benefits, the Appeals Council shall evaluate the entire record including any new and material evidence submitted. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

Therefore, when new and material evidence is submitted, the Appeals Council must consider it "regardless of whether there was good cause for not producing it earlier." Mills v. Apfel, 244 F.3d 1, 5-6 (1st Cir. 2001).

The timing of the submission of new information is also set by regulation. The Appeals Council requires that an applicant submit new evidence with the request for review. See 20 C.F.R. § 404.968(a) (2001) (instructing that any documents or other new evidence complainant wishes the Appeals Council to consider should be submitted with request for review); see also Bilodeau, 856 F. Supp. at 21 (finding good cause for remand when new

evidence arose three days after request for review because submission to the Appeals Council during its deliberations was "impossible"). The SSA's documents also state that evidence may not be submitted to the Appeals Council after the filing of the Request for Review. The "Notice of Decision - Unfavorable" issued by the ALJ states, "You should submit any new evidence you wish to the Appeals Council to consider **with** your request for review." (emphasis in original). The "Request for Review of Hearing Decision/Order," SSA Form HA-520-U5 states,

> If you have additional evidence, submit it with this request for review. If you need additional time to submit evidence . . . you must request an extension of time in writing now. . . . If you neither submit evidence . . . now nor within any extension of time the Appeals Council grants, the Appeals Council will take its action based on the evidence in the record.

Without citation to regulation or caselaw, the government argues that plaintiff was required to submit new evidence acquired after the filing of the Request for Review and before the Appeals Council issued its decision and that failure to do so bars remand. However, the SSA's instructions to the claimant do not provide that option. Justice O'Connor's concurring opinion in Sims v. Apfel, 530 U.S. 103, 120 S.Ct. 2080 (2000), provides helpful guidance. In Sims, the Supreme Court, rejecting a waiver claim, allowed a social security applicant to raise in court an issue not raised before the Appeals Council. Justice O'Connor's

concurring opinion, which provided the swing vote, relied on the ground that the regulations in question "might have misled applicants as to the duty to raise issues in the Appeals Council." Id. at 2086-87.

Here, Dr. Stern's report was authored four days before the decision of the Appeals Council. Particularly in light of the lack of clarity of the regulations and the timing of the report, I conclude that failure to submit this report to the Appeals Council does not bar its consideration in this Court. Moreover, Dr. Weiner's report was authored after the decision of the Appeals Council. Thus, neither report was available for submission to the Appeals Council, and I will consider both reports under the Evangelista standard.

B. The Stern Report

The threshold issue is whether plaintiff had good cause for not obtaining the reports by Dr. Stern earlier. Dr. Stern's report concerns, in part, the results of a lumbar MRI scan that took place on June 16, 2000 (the same day as the ALJ's decision), revealing a multitude of spine problems. This scan was performed approximately one month before plaintiff filed a request for review of the ALJ's decision on July 18, 2000. Arguably, plaintiff could have submitted the June 2000 scan as new evidence in his request for review on July 18, 2000, or request an extension of time from the Appeals Council.

However, the key information is not the scan but the neurosurgeon’s evaluation of the scan and the nerve root surgery on August 29, 2000. Dr. Stern's February 2001 report includes additional diagnoses that were not available before July 18, 2000, when plaintiff requested review. Dr. Stern discusses the results of examinations that took place on August 10 and 29, 2000 and January 25, 2001. Plaintiff has good cause for not having previously submitted this evidence because these medical reports were unavailable either at the time of the ALJ's decision or at the time of plaintiff's request for review. See Sullivan v. Finkelstein, 496 U.S. 617, 626 (1990) (stating that remand is appropriate “when the district court learns of evidence not in existence or available to the claimant at the time of the administrative proceeding that might have changed the outcome of the proceeding.”).

This February 2001 report by Dr. Stern handily meets the “materiality” necessary for § 405(g) remand. See Evangelista, 826 F.2d at 139. “The mere existence of evidence in addition to that submitted before the hearing examiner will not constitute sufficient cause for remand.” Evangelista, 826 F.2d at 139. Remand is only appropriate when the Secretary's decision “might reasonably have been different” if the new evidence had been considered. Id. at 140 (quoting Falu v. Sec’y of Health and Hum. Servs., 703 F.2d 24, 27 (1st Cir. 1983)).

Dr. Stern's report fills in an important gap in the record. Why was plaintiff experiencing pain in his left leg? The lower back and left leg impairments that were diagnosed in August 2000 and January 2001 involved the L4-L5 region. Although the ALJ was aware of plaintiff's transverse myelitis (in the mid to lower back (in the T region) and injuries to discs of the upper back and neck (in the C region), on June 16, 2000 the ALJ had no knowledge of the disc and nerve problems in plaintiff's lower back (in the L region) and left leg. As the August and January reports diagnose maladies in the same area of the body (left leg and back from the waist down) where plaintiff testified he felt pain, these reports shed new light on the cause and extent of the symptoms the plaintiff alleged at the hearing. Indeed, the government does not even contest the materiality and newness of the Stern report.

**2. Dr. Mark Weiner's Report**

Plaintiff also submits as new evidence Dr. Mark Weiner's opinion concerning an examination that took place on November 13, 2001. Dr. Weiner reported that plaintiff never fully recovered from transverse myelitis, and that he continues to suffer from Brown-Sequard's syndrome. Dr. Weiner stated that although there was some initial improvement after the onset of transverse myelitis, plaintiff experienced residual problems such as severe burning dysesthesia throughout the left side if his body

especially into the leg. He then opined that plaintiff's "functional capacity is very severely restricted as a result of his symptom complex and clinical findings." Dr. Weiner concluded that plaintiff was incapable of performing heavy labor work, light duty work, or sedentary work.

The failure to submit this evidence satisfies the good cause element under Evangelista because Dr. Weiner examined plaintiff on November 13, 2001, long after the decision of the Appeals Council. Clearly then, Dr. Weiner's report could not have been submitted in the administrative proceeding because it was not available.

However, whether Dr. Weiner's report satisfies the newness/ materiality element is not so clear; its materiality depends on whether the report relates to the time period considered at the ALJ hearing. Where new evidence presents further proof of the chronicity of an impairment as it existed at the time of the hearing, which might have influenced the ALJ's understanding of plaintiff's condition, courts have found materiality. See Rawls v. Apfel, 998 F. Supp. 70, 76 (D. Mass. 1998). If Dr. Weiner's November 2001 assessment relates to the chronic nature of the plaintiff's impairments at the time of the May 2000 hearing, the report may be helpful in understanding plaintiff's condition. However, there is also a strong argument that it is simply a rehash of existing diagnoses available to and rejected by the

ALJ. A plaintiff does not get a second bite of the apple simply by hiring another expert who disagrees with the ALJ. If Dr. Weiner's report merely describes the deterioration of the plaintiff's condition as it was in November 2001, and does not relate back a year-and-a-half earlier to the time of the hearing, it is not material.

It is up to the ALJ on remand to determine whether Dr. Weiner's report describes the subsequent deterioration of plaintiff's condition since the hearing, is merely cumulative, or is material new information concerning the chronicity of the condition not available at the time of the hearing.

**ORDER**

Plaintiff's motion for remand (Docket No. 12) to the SSA for a new administrative determination taking into account new evidence is **ALLOWED**. The Defendant's motion for order affirming decision of the Commissioner (Docket No. 17) is **DENIED**. Plaintiff's motion for judgment on the proceedings (Docket No. 14) is **DENIED**.

PATTI B. SARIS
United States District Judge